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IN THE
SUPREME COURT of the UNITED STATES
October Term 1989

CONSUMER VALUE STORES,

Petitioner,

v.

BOARD OF PHARMACY OF NEW JERSEY

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

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HT 127

QUESTIONS PRESENTED FOR REVIEW

1. Is a state statute regulating the practice of pharmacy which prohibits "[t]he distribution of premiums or rebates of any kind whatever in connection with the sale of drugs ..." sufficiently clear to apprise an ordinary pharmacist of its meaning so as to defeat a claim of vagueness?

2. May a state, in regulating an activity affecting the public health such as the practice of pharmacy, enact a statute either to foster the goal of monitoring patient drug usage or to prevent unfair sales practices or destructive price wars that can adversely affect pharmaceutical services and professional standards?

3. May a state consistent with the due process Clause enforce a regulatory statute by adjudication without first promulgating regulations?

4. May a state, consistent with the dictates of the Equal Protection clause of the Fourteenth Amendment, enact a statute which grants persons over the age of 62 the ability to purchase drugs at a discount, while denying that ability to those under age 62 who are not members of a suspect class?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

CONSUMER VALUE STORES,

Petitioner,

v.

NEW JERSEY BOARD OF PHARMACY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

COUNTERSTATEMENT OF THE CASE

The question presented by this appeal is the constitutional validity of a New Jersey State statute prohibiting the distribution of rebates and premiums in connection with the sale of prescription drugs pursuant to N.J.S.A. 45:14-

12(f). The anti-rebate statute declares it to be grossly unprofessional conduct to distribute "... premiums or rebates of any kind whatsoever in connection with the sale of drugs and medications ..." with certain exceptions including the sale of medications "to any person who is 62 years of age or older." N.J.S.A. 45:14-12(f).*

In March 1985, Consumer Value Stores (hereinafter "C.V.S."), distributed mail circulars for its pharmacies in Wayne, New Jersey, advertising "prescription savings" and that for a one week period,

* The full text of N.J.S.A. 45:14-12, one of two statutes (the other statute is N.J.S.A. 45:1-21), which detail the grounds upon which a license to practice pharmacy may be suspended or revoked, is reproduced in its entirety in the Appendix at Ral.

all prescriptions (with certain limited exceptions) would be offered for sale at a flat price of \$3 (T2-20 to T4-15; Pa32; Pa57).* The \$3/one week only offer was not the customary price for most prescriptions (T55-9 to 24; Pa32), and for most drugs \$3 was less than the pharmacy's acquisition cost (T56-24 to T57-5; Pa32). After the week of the sale, the prices went back up (T56-22 to 23; Pa32).

The Board of Pharmacy issued a Penalty letter (serving as a complaint) to Timothy Brophy (a former employee of the Petitioner herein), the registered

* "T" shall refer to the transcript of the hearing filed with the Supreme Court of New Jersey in the record below. "Pa" shall indicate the appendix to the Petition for Certiorari of the Petitioner, Consumer Value Stores.

pharmacist-in-charge of a C.V.S. pharmacy in Wayne, New Jersey, alleging he had violated the statute in July 1985.

A hearing was scheduled in the matter before the Board of Pharmacy for April 30, 1986. Just prior to the hearing date, Petitioner's counsel requested and was granted an adjournment. An action filed by Mr. Brophy in January 1986 was then pending in the United States District Court, seeking an injunction, damages and other relief based on the alleged unconstitutionality of the Board's action to that point. That suit was later dismissed on a motion for summary judgment by the defendant, Board of Pharmacy by Order of the Hon. H. Lee Sarokin, U.S.D.J., dated September 30,

1986.* The Court found that an earlier constitutional challenge filed by C.V.S. to 12(f), which was summarily dismissed by this Court (discussed infra at 15), was dispositive of a similar challenge by C.V.S.' employee, Mr. Brophy.**

A hearing was held in this matter before the Board of Pharmacy on November 12, 1986. Evidence adduced at the hearing established that the C.V.S. Pharmacy had issued the advertisement in

* The Order dismissing one of petitioner's earlier challenges is part of the record below and included in the Appendix to respondent's brief to the Supreme Court of New Jersey at RAa13.

** A partial transcript of the oral opinion dismissing petitioner's U.S. District Court Complaint in Brophy v. New Jersey State Board of Pharmacy, U.S.D.C., D.N.J., Civil No. 86-125SA is located at RAa14 of the respondent's appendix in its brief to the Supreme Court of New Jersey.

question, that the pharmacy carried out the offer in the advertisement by selling all drugs with certain exceptions for only \$3 during the week in question, and that \$3 was lower than the usual and customary price and less than the acquisition cost for most of the medications at the C.V.S. pharmacy in Wayne, of which Mr. Brophy was the pharmacist-in-charge (T2 to T4; T55 to T57; Ra32).

A Final Order embodying Findings of Fact and Conclusions of Law was filed by the Board on February 5, 1987, concluding that Mr. Brophy, as the pharmacist-in-charge, was "responsible for ... the advertising utilized by the pharmacy pursuant to N.J.A.C. 13:39-8.14(b)(14)" and had violated the anti-rebate statute by distributing prescription discounts or premiums prohibited by N.J.S.A. 45:14-

12(f). The Board imposed a monetary penalty of \$500 (Pa45 to Pa47). Petitioner appealed to the Appellate Division.

The New Jersey Appellate Division rendered a decision on April 28, 1988, declaring the anti-rebate statute, N.J.S.A. 45:14-12(f), unconstitutional (Pa23 to Pa30), finding that the statute was void for vagueness as not sufficiently explicit to inform those subjected to penalty as to the conduct which would render them liable (Pa30). The Court also found that the statute failed to fulfill the purpose of serving the public health, safety or welfare (Pa28 to Pa29), although the same statute had previously been upheld and found to serve the public interest by the New Jersey Appellate Division in a decision which was appealed to this Court, In re Board of Pharmacy

Decision to Prohibit Use of Advertisements Containing Coupons for Prescription Drugs, 191 N.J. Super. 7, 465 A.2d 522 (App. Div. 1983), certif. den. 95 N.J. 189, 470 A.2d 413 (1983), app. diss. 465 U.S. 1095 (1984), and by the New Jersey Chancery Division which upheld the constitutionality of the statute in somewhat different form in Supermarkets Gen. Corp. v. Sills, 93 N.J. Super. 326, 225 A.2d 728 (Ch. Div. 1966).

The Supreme Court of New Jersey, (upon Notice of Appeal by the Board of Pharmacy), unanimously reversed the Appellate Division and reinstated the anti-rebate statute (Pa44). In a decision based in part on the New Jersey Constitution, the New Jersey Supreme Court found that there are several rational bases supporting the statute,

that is the promotion of the goal of monitoring of patient prescriptions (Pa37 to Pa38), and the prevention of price wars that could eliminate or reduce the availability of health related pharmacy services and adversely affect professional standards (Pa38).

In its decision, the Supreme Court considered whether the statute satisfied substantive due process and commented that the presumption of validity that attaches to statutes that attempt to protect the public safety, health and welfare, under this Court's rulings, is "particularly daunting" (Pa36; citing Nebbia v. New York, 291 U.S. 502 (1934)).

The New Jersey Supreme Court recognized that in order to be rationally related to the public interest, a statute need not be the best or only method of

achieving the legislative purpose. The Court also found that a statute should be sustained if it has any conceivable rational purpose (Pa37). Judged by these standards, the Court found the anti-rebate statute to be a rational response to the goal of monitoring patient drug utilization and that the New Jersey State Legislature could have concluded that the statute was an effective means of preventing price wars in this health related profession (Pa38).

Rejecting petitioner's vagueness challenge, the Court found that a "discount" or "rebate" means a deduction "from a sum owing or to be paid" (Pa40), and giving the language of the statute its "ordinary meaning," the Court believed that an ordinary pharmacist would understand that to reduce prices one week

and raise them the next is a discount (Pa40).

As to petitioner's argument that the senior citizen exemption which allows those over age 62 to receive discounts and rebates in connection with the purchase of prescription medication, the Supreme Court found that under federal equal protection analysis, as persons under age 62 are not members of a suspect or even semi-suspect class, no constitutional right is implicated. The rational basis test (which it already found satisfied), therefore applied.

As to the alleged necessity for rulemaking prior to adjudication under the statute, the court ruled that "[a]dministrative agencies have wide discretion in selecting the means to fulfill their delegated duties," and found that

rulemaking was not a condition precedent to adjudication in the instant matter as the Legislature had expressly proscribed the prohibited conduct (Pa42).

Finally, the Supreme Court found that the statute was not an unwarranted exercise of economic protectionism, that even if the statute was partially motivated by a desire to economically protect individual pharmacists that would not invalidate the statute, and that in any event, no group was at a competitive disadvantage under the statute (Pa39).

Following announcement of the decision by the New Jersey Supreme Court on August 14, 1989 (Pa31), the Board of Pharmacy stayed enforcement of the anti-rebate statute for one month in order to permit adequate opportunity for licensees and the public to be made aware of the

requirements, conform their practices to the statute and permit honoring of then currently outstanding discount or rebate coupons (Pa58). Subsequent motions by C.V.S. for stay beyond September 13, 1989 were denied by the Board, the New Jersey Appellate Division (Pa48), the Supreme Court of New Jersey (Pa49), Justice Brennan (Pa50); and finally by this Court on October 16, 1989 (Pa61). The instant petition for certiorari followed.

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE THE SUPREME COURT OF NEW JERSEY CORRECTLY UPHELD THE CONSTITUTIONALITY OF A STATUTE WHICH PROHIBITS PHARMACISTS FROM OFFERING DISCOUNTS, REBATES OR PREMIUMS ON THE SALE OF PRESCRIPTION DRUGS AS THE STATUTE IS RATIONALLY RELATED TO THE PROTECTION OF THE PUBLIC HEALTH AND SAFETY, PROVIDES SUFFICIENT GUIDANCE TO PHARMACISTS TO DEFEAT VAGUENESS CLAIMS, SATISFIES EQUAL PROTECTION AS IT DOES NOT AFFECT A SUSPECT CLASS AND IS RATIONALLY BASED, AND AS THERE WAS NO DUE PROCESS VIOLATION IN THE BOARD OF PHARMACY ENFORCING THE STATUTE THROUGH ADJUDICATION WITHOUT ADOPTING REGULATIONS.

In Nebbia New York, 291 U.S. 502 (1934) this Court advised that the presumption of validity that attaches to statutes is especially daunting when applied to a statute enacted to protect the public health, safety or welfare. As the statute in question relates directly to the protection of the public health

and as the Supreme Court of New Jersey properly concluded that the statute has several rational bases and is sufficiently clear to defeat a vagueness claim, the instant matter warrants no further review by this Court.*

* It is noteworthy that this is the second occasion that the same party, C.V.S. Pharmacy is requesting this Court to invalidate the identical anti-rebate statute. In the prior case, In re Board of Pharmacy Decision to Prohibit Use of Advertisements Containing Coupons for Prescription Drugs, 191 N.J. Super. 7, 465 A.2d 522 (App. Div. 1983), cert. den. 95 N.J. 189, 470 A.2d 413 (1983), app. dismissed 465 U.S. 1095 (1984), this Court upheld New Jersey's ban on pharmacy discount coupons under N.J.S.A. 45:14-12(f) against a First Amendment and Equal Protection challenge, when it dismissed C.V.S.' appeal for want of a substantial federal question. Such an action by this Court has been held to be a determination on the merits. See Mandel v. Bradley, 432 U.S. 173, 176 (1977). Ironically, in this case C.V.S.' Challenge is based on substantive due process, under which a

(Footnote Continued On Following Page)

In New Jersey the practice of pharmacy has been found to vitally effect the public health and welfare and thus be subject to regulation. Supermarkets General Corp. v. Sills, 93 N.J. Super. 326, 225 A.2d 728 (Ch. Div. 1966). The Legislature, in establishing such regulation, determined that the public interest mandated a prohibition on certain activities including the distribution of premiums or rebates in connection with the sale of drugs under 12(f).

The Supreme Court of New Jersey correctly concluded that the statute is

(Footnote Continued From Previous Page)

state statute is subject to lesser scrutiny than the heightened scrutiny for First Amendment matters under which the statute was upheld in the earlier matter.

rationaly based as the Legislature could have determined it "is an effective means of preventing destructive price wars that could adversely affect pharmaceutical services and professional standards" (Pa38), and as the Supreme Court also correctly concluded that the statute is a rational response to the goal of encouraging effective monitoring of patient drug utilization (by prohibiting pricing policies that encourage customers to jump from pharmacy to pharmacy according to which pharmacy has the cheapest price that week, customers are encouraged to patronize one pharmacy which is required to maintain a patient profile record card in New Jersey to prevent the taking of incompatible drugs).

Despite petitioner's efforts to cast the decision below as involving "numerous

substantial federal questions" affecting the public health and safety and requiring "thorough examination by this Court," no substantial question warranting consideration by this Court has been presented.

First the petitioner asserts that the constitutional rights of consumers and pharmacists are violated as the anti-rebate statute will "compel the individuals to shop at the same pharmacy against their will... place pharmacists in jeopardy of economic deprivation and inhibit[s] the pharmacists [sic] ability to pursue his livelihood ..." (Pb7). These contentions are baseless. First, there is no compulsion or binding relationship with a pharmacy present in the statute. Rather, the State is encouraging patients to shop at one pharmacy and one

reason is that the patient's health will be better protected by one full record of their drug utilization to catch interactions, overusage or drug incompatibility.

Such encouragement consistent with the legislative policy is entirely proper. As was stated by this Court in Maher v. Roe, 432 U.S. 464 (1977), a case involving the state's encouragement of childbirth by subsidizing its costs while not subsidizing non-therapeutic abortion because of the state's value judgment favoring childbirth, "[T]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." Id. at 495. This Court found that the state's power to encourage

actions deemed to be in the public interest is necessarily broad. Id. at 496. Similarly here, the State is not attempting to force patients to shop only at one pharmacy, but rather encouraging them to do so because it is deemed to be in the public interest. Such encouragement is certainly not a violation of due process.

Petitioner's argument that pharmacists' ability to earn a livelihood is inhibited, implicating constitutional rights, must also fail. As correctly pointed out by the Supreme Court of New Jersey, no particular group of pharmacists is put at a competitive disadvantage by the statute (Pa39). Thus, no one is inhibited from earning a livelihood. Even assuming arguendo that the statute were partially motivated by a desire to

protect individual pharmacists, as it is supported by valid purposes, it should be sustained (Pa39; Williamson v. Lee Optical of Okla., 348 U.S. 483, 487-88, reh. den., 349 U.S. 925 (1955); Kotch v. Board of River Pilot Comm'rs, 330 U.S. 552, reh. den., 331 U.S. 864 (1947); United States v. Carolene Prods., 304 U.S. 144, 152-54 (1937)). Thus, petitioner's claim that there may be one arguably improper motive is irrelevant.

Moreover, petitioner's vagueness challenge was properly rejected by the Supreme Court of New Jersey, a ruling not warranting further review by this Court as it is self-evidently in concert with principles enunciated by this court regarding vagueness.

In reviewing regulatory statutes against challenges grounded in vagueness

it is well established that a court must determine whether the language and terms challenged are "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" and whether an individual "... was reasonably apprised as a matter of common intelligence in light of ordinary human experiences that his particular conduct was unlawful...." In re Broadwalk Regency Casino Lic. Appl., 180 N.J. Super. 324, 345-347, 434 A.2d 1111 (App. Div. 1981), aff'd 90 N.J. 361, 447 A.2d 1335 (1982), app. dismiss. sub nom. Perlman v. Attorney General of New Jersey, 459 U.S. 1981 (1982) (emphasis supplied). See, Grayned v City of Rockford, 408 U.S. 104 (1971).

Equally well established by this court is the principle that a statute

relating to economic regulation is subject to less strict requirements as to vagueness. Thus, in the context of rejecting a vagueness challenge to a municipal ordinance requiring a license to sell "items designed or marketed for use with illegal cannabis or drugs" this Court has said:

The degree of vagueness that the Constitution tolerates -- as well as the relative importance of fair notice and fair enforcement -- depend in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.... [Hoffman

Estates v. Flipside, Hoffman Estates
455 U.S. 489, 498-499 (1982); em-
phasis supplied]

The Supreme Court in New Jersey
has enunciated standards for determining
vagueness challenges in the context of
a professional disciplinary statute
involving physicians setting forth the
following guidelines in the case of In re
DeMarco Suspension, 83 N.J. 25, 414 A.2d
1339 (1980):

The question ultimately is one of
fairness, given the statute and its
provisions, and given the situation
of the defendant. Should he have
understood that his conduct was
proscribed, should he have under-
stood that the penalty about to be
imposed was the sanction intended
by the Legislature? The test is
whether the statute gives a person
of ordinary intelligence fair notice
that his conduct is forbidden and
punishable by certain penalties.
That test, however, does not consist
of a linguistic analysis conducted
in a vacuum. It includes not simply
the language of the provision itself
but related provisions as well, and
especially the reality to which the

provision is to be applied. The test here is whether a physician of ordinary intelligence would have understood, and would have been given fair notice by virtue of these provisions, that his conduct rendered him liable to a \$200 penalty as to each patient. [Id. at 37; emphasis supplied]

Thus in New Jersey vagueness challenges are analyzed from the point of view of the peculiar expertise of those to whom the statute applies. See also, Matter of Polk, 90 N.J. 550, 575, 449 A.2d 7 (1982).

Similarly, this court should consider whether Mr. Brophy, a pharmacist of ordinary intelligence, would have understood that his conduct in advertising and selling prescriptions at the less than-customary price of \$3 for one week only (T2-20 to T4-15; T55 to T57), was prohibited by the statute's proscriptions against the distribution of

premiums or rebates. It is noteworthy in that regard that even the Appellate Division in New Jersey in this case found that (1) the term "rebate" in the statute must be read as synonymous with "discount" (Pa26); (2) recognized that Mr. Brophy testified that the \$3 one week offer was not the customary price for most prescriptions and was less than the pharmacy's acquisition cost for certain drugs (Pa25); and (3) apparently criticized CVS for "offering up Brophy as the vehicle for making an assault upon the constitutionality of N.J.S.A. 45:14-12(f)" (Pa26), implicitly recognizing that there was an intentional attempt to violate -- and therefore challenge -- the statute. Yet the Appellate Division found that the statute was not sufficiently explicit to inform those subject

to penalties as to the conduct that is prohibited (Pa27).

The Supreme Court in New Jersey correctly reversed, agreeing with the Appellate Division that the words "discount" and "rebate" mean "a deduction from a gross amount ... an amount deducted from a sum owing or to be paid" (Pa40), and finding that an ordinary pharmacist would understand it is "a discount to reduce prices one week and raise them the next" (Pa40).

The Court also gave short shrift to petitioner's argument that the statute must be vague as there is no baseline price specified from which a discount would be calculated. The Supreme Court recognized that petitioner's argument has no relevance to the instant matter, as "the pharmacy's own prices provide all

that need be known to uncover the discount" (Pa40).

Finally, petitioner's attempts to alter the facts of this case to involve "price setting" (Pa11) and to claim that the statute prevents pharmacists from even reducing their prices after the usual and customary price has been set (Pa13) must fail. This case self-evidently involves only a one-time, one week discount in prices clearly proscribed by the statute. This Court should not even consider contentions by petitioner that are not raised by the facts of this case.

Petitioner's Equal Protection challenge similarly does not merit the fur-

ther consideration of this court.* The Supreme Court of New Jersey correctly determined that as persons under age sixty-two are not members of a suspect classification, a statute which permits discounts to those over age sixty-two while denying discounts to those under that age, would be judged under the rational basis test which the Court found satisfied (Pa41).

There is no question that the anti-rebate statute suffers no infirmity on

* It should also be pointed out that C.V.S. raised an identical equal protection challenge to the identical statute in this Court (which was dismissed for want of a substantial federal question), in In the Matter of the Board of Pharmacy Decision to Prohibit the Use of Advertisements Containing Coupons for Prescriptions Drugs, supra. The equal protection issue is res judicata, having been decided unfavorably to C.V.S. previously.

equal protection grounds. Contrary to petitioner's assertion (Pa20 to Pa21), the Senior Citizen exemption to the anti-rebate provision is a permissible exercise of the legislative judgment. Petitioner concedes that age has not been viewed as a suspect classification (Pa19). Notwithstanding that the Legislature intended to prevent price wars or eliminate unfair competition by the enactment of the anti-rebate provision, they could still determine to allow an exemption to this one limited group. See New Orleans v. Dukes, 427 U.S. 297 (1976); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). The Legislature may have perceived no need to extend the ban on rebates and premiums to those 62 years of age or older because the lawmakers saw no threat to the economic

viability of pharmacies posed by discounts utilized by this portion of the population. As in Schwartz v. Judicial Retirement System of N.J., 584 F. Supp. 711 (D.C.N.J. 1984) the Legislature "had some countervailing reason for building the exception into the statute..." and its purposes are not advanced in "so few cases that it must be 'wholly unrelated' to the objective of the statute." Id. at 729.

It is entirely proper for the Legislature to determine to deal with a perceived evil as it sees fit, one aspect at a time and it may adopt a policy that only partially ameliorates a perceived evil. See New Orleans v. Dukes, supra, at 303. The Legislature appropriately may have determined that on balance, a small portion of the population (in this

instance senior citizens) could qualify for an exemption. As no suspect classification is involved and as the exemption is certainly rationally based and within the legislative discretion, there is no violation of equal protection.

Finally, petitioner's contentions that a lack of regulations promulgated pursuant to the statute preclude the agency from enforcing the statute by adjudication are without merit and consequently not worthy of further review by this court.

A lack of regulations does not invalidate a statute. Thus, "it is well established that an administrative agency may properly and constitutionally operate without formal, particularized rules and regulations." Sheeran v. Progressive Life Ins. Co., 182 N.J. Super. 237, 246, 440

A.2d 469 (App. Div. 1981), citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 294-295, (1974); Securities and Exch. Comm'n. v. Chenery Corp., 332 U.S. 194, 201-203 (1947).

The Supreme Court of New Jersey correctly ruled that as the Legislature herein has proscribed the conduct for which action was taken and as "[a]dministrative agencies have wide discretion in selecting the means to fulfill their delegated duties" (Pa42), the choice of the Board of Pharmacy to proceed to enforce the statute by adjudication would not be disturbed. See Texter v. Department of Human Services, 88 N.J. 376, 383, 386, 443 A.2d 178 (1982); Bally Mfg. Corp. v. New Jersey Casino Control Comm'n 85 N.J. 325, 338, 426 A.2d 1000 app. diss., 454 U.S. 804 (1981).

Petitioner concedes that an agency may announce principles in an adjudicative proceeding (Pall). In SEC v. Chenery Corp., supra, this court approved enforcement of a statute without specific rules, by adjudication. In approving action taken by the Securities and Exchange Commission pursuant to statute but without a specific rule covering a problem (management trading during a company reorganization), this Court stated:

To hold that the Commission had no alternative ... but to approve the proposed transaction, while formulating any general rules it might desire for use in future cases of this nature, would be to stultify the administrative process. That we refuse to do. [Id. at 202]

The Board urges the Court to rule similarly in the instant case.

As the anti-rebate statute represents a valid legislative judgment to promote the public health, as the statute provides sufficient guidance to defeat vagueness claims, as the Board's determination did not constitute ad hoc rule-making as there is no valid equal protection claim, and as the determination of the New Jersey Supreme Court was correct in all respects, this matter does not raise issues sufficient to require additional review by this court and therefore the petition should be denied.

CONCLUSION

For the above-stated reasons,
it is respectfully submitted that the
petition for certiorari should be denied.

Respectfully submitted,

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ATTORNEY GENERAL OF NEW JERSEY

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DATED: December 20, 1989

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N.J.S.A. 45:14-12

Refusal of examination; suspension or revocation of certificate; person deemed unregistered during suspension or revocation; hearing; court review

The board may refuse an application for examination or may suspend or revoke the certificate of a registered pharmacist or a registered assistant pharmacist for any of the following causes: When the application or registration is shown to have been obtained by misrepresentation or fraudulent means or when the applicant or registrant is guilty of chronic or persistent inebriety, or has been adjudged guilty of violating any State or Federal law or any law of the District of Columbia or of any territory of the United States relating to the practice of pharmacy, or relating to the dispensing of drugs, or has been convicted of a crime involving moral turpitude, or has impersonated an applicant for registration before the board or has been convicted of knowingly, intentionally or fraudulently adulterating or causing to be adulterated drugs, chemicals or medicinal preparations or has sold or caused to be sold adulterated drugs, chemicals or medicinal preparations knowing, or having reason to know, that same were adulterated, or has procured or attempted to procure registration for another by misrepresentation or

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fraudulent means, and the board shall refuse an application for examination or suspend or revoke the certificate of a registered pharmacist or a registered assistant pharmacist when the applicant or registrant is shown to be addicted to the use of narcotic drugs, or has been convicted of violating any law of this or any other state or of the United States relating to narcotic drugs or has been adjudicated an incompetent, or is shown to have any abnormal physical or mental condition which threatens the safety of persons to whom said applicant or registrant might sell or dispense prescriptions, drugs, chemicals, medicinal preparations or devices or for whom he might manufacture, prepare or package, or supervise the manufacturing, preparation or packaging of prescriptions, drugs, chemicals, medicinal preparations or devices. In addition, the board may refuse an application for examination or may suspend or revoke the certificate of a registered pharmacist or a registered assistant pharmacist upon proof satisfactory to the board that such registered pharmacist or such registered assistant pharmacist is guilty of grossly unprofessional conduct and the following acts are hereby declared to constitute grossly unprofessional conduct for the purpose of this act:

a. Paying rebates or entering into an agreement for payment of rebates to any physician, dentist or other person for the recommending of the services of any person.

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b. The providing or causing to be provided to a physician, dentist, veterinarian or other persons authorized to prescribe, prescription blanks or forms bearing the pharmacist's or pharmacy's name, address or other means of identification.

c. (Deleted by amendment.)

d. The claiming of professional superiority in the compounding or filling of prescriptions or in any manner imply professional superiority which may reduce public confidence in the ability, character or integrity of other pharmacists.

e. Fostering the interest of one group of patients at the expense of another which compromises the quality or extent of professional services or facilities made available.

f. The distribution of premiums or rebates of any kind whatever in connection with the sale of drugs and medications provided, however, that trading stamps and similar devices shall not be considered to be rebates for the purposes of this chapter and provided further that discounts, premiums and rebates may be provided in connection with the sale of drugs and medications to any person who is 62 years of age or older. Before a certificate shall be refused, suspended or revoked, the accused person shall be furnished with a copy of the complaint and given a hearing before the board. Any person whose certificate is so suspended or revoked shall be deemed an

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unregistered person during the period of such suspension or revocation, and as such shall be subject to the penalties prescribed in this chapter, but such person may, at the discretion of the board, have his certificate reinstated at any time without an examination upon application to the board. Any person to whom a certificate shall be suspended or revoked by the board shall have the right to review such action by appeal to the Appellate Division of the Superior Court in lieu of prerogative writ.

g. Advertising of prescription drug prices in a manner inconsistent with rules and regulations promulgated by the Director of the Division of Consumer Affairs; provided, however, no such advertising of any drug or substance shall be authorized unless the Commissioner of Health shall have determined that such advertising is not harmful to public health, safety and welfare.

